

**Addendum to OGC Issue Paper on Sustenance Fishing Right in Indian Country Topic 1
Briefing Paper**

Excerpts from Original Source Material

Maine Settlement Acts:

“Sustenance fishing within the Indian reservations. Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.” ME. REV. STAT. tit. 30, § 6207(4)

Department of Interior 2015 Solicitor’s Opinion:

“We have reviewed applicable law and ... conclude that all four of the Maine tribes-the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs-have federally-protected tribal fishing rights. These fishing rights should be taken into account in evaluating the adequacy of WQS in Maine.”

“The fishing rights of the Passamaquoddy Tribe and Penobscot Indian Nation in their Reservation waters are expressly reserved fishing rights: the Maine Implementing Act acknowledges the right of Penobscot Nation and Passamaquoddy members to ‘take fish ... for their individual sustenance’ within their reservations free of state regulation.”

“The sources of the fishing rights of Maine’s Northern Tribes are different in that they are not discussed explicitly in the Settlement Acts. However, express language in a statute or treaty is not necessary to establish the existence of a tribal fishing right. Tribal fishing rights are implied through an analysis of the purpose of these land settlements-to create a permanent land base-and the trust property interests created pursuant to the Acts. ... [T]hese fishing rights are also rooted in state common law on the right of riparian owners to fish on their properties in addition to the Settlement Acts and federal common law on the importance and durability of tribal fishing rights.”

“Tribal fishing rights encompass subsidiary rights that are not explicitly included in treaty or statutory language but are nonetheless necessary to render them meaningful. ... In the context of water quantity, courts have recognized that tribal fishing rights include the subsidiary right to water flow sufficient to maintain fish health and reproduction in order to effectuate the fishing right.”

“In summary, fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right. Case law supports the view that water quality cannot be impaired to the point that fish have trouble reproducing without violating a tribal fishing right; similarly water quality cannot be diminished to the point that consuming fish threatens human health without violating a tribal fishing right. A tribal right to fish depends on a subsidiary right to fish populations safe for human consumption.”

EPA February 2015 Decision Document:

“The settlement acts in Maine include extensive provisions to confirm and expand the Tribes’ land base, and the legislative record makes it clear that a key purpose behind that land base is to preserve the Tribes’ culture and support their sustenance practices.”

“MIA section 6207 did not create a fishing right for the Southern Tribes. Rather it confirmed an aboriginal right the Tribes have continuously exercised, and shielded that right from state regulation absent a finding of depletion.”

“MICA and MIA combine to authorize the establishment of trust lands for the Southern Tribes to provide a land base in which the Tribes can exercise their sustenance fishing practices. As compared with the sustenance fishing right reserved to the Southern Tribes within their reservations, MICA and MIA allow for a greater, although still sharply limited, role for the State, through the commission, to participate in the development of fishing regulations on certain of the waters in the trust lands. But in exercising even that authority, the commission is charged with considering the Tribes’ sustenance fishing practices. Therefore, it is clear that a critical purpose behind establishing the Southern Tribes’ trust lands is to give the Tribes an opportunity to engage in sustenance fishing.”

“Compared with the Southern Tribes’ territories, the arrangement for the Northern Tribes’ trust lands provides for more direct state regulation of fishing practices. Nevertheless, it appears Congress intended these trust lands to preserve the Northern Tribes’ unique cultures as well. So the Northern Tribes’ trust lands provide a land base in which the Tribes are able to exercise sustenance fishing practices to the extent consistent with the legal limits on their fishing.”

“While Congress intended that the Indian lands in Maine provide a land base to support all the Tribes’ sustenance practices, it ratified dramatically different regulatory frameworks within which the Southern and Northern Tribes could operate in exercising those practices. In their reservations and lesser ponds in their trust lands, the Southern Tribes are substantially free from state fishing regulations, and elsewhere in their trust lands any regulation of the Southern Tribes’ fishing must consider their sustenance practices. As explained in the discussion of the State’s jurisdictional authority above, the Northern Tribes and their trust lands are subject to the laws of the State, including the regulation of natural resources, which includes fishing rights. So unlike the Southern Tribes, the ability of the Northern Tribes to exercise their sustenance fishing practices is potentially subject to regulation directly under state law. As DOI’s legal opinion explains, the Northern Tribes’ trust lands include fishing rights appurtenant to those land acquisitions, which are subject to state regulation.”

In 1980, MICA provided that “[t]he Secretary is authorized and directed to expend . . . the land acquisition fund for the purpose of acquiring land or natural resources for the . . . the Houlton Band of Maliseet Indians and for no other purpose.” 25 U.S.C. § 1724(b)

(emphasis added). “Land or natural resources” is defined to include “water and water rights, and hunting and fishing rights.” 25 U.S.C. § 1722(b) (emphasis added).

Similar to the settlement with the Maliseets, MSA [Micmac Settlement Act] provides that the Micmacs’ trust lands include natural resources. 30 M.R.S. § 7202(2) (“‘Aroostook Band Trust Land’ means land or natural resources acquired by the secretary in trust for the Aroostook Band of Micmacs . . .”). MSA further defines natural resources to include fishing rights. Id. at § 7202(3) (“‘Land or other natural resources’ means any real property or other natural resources . . . including, but without limitation . . . water and water rights and hunting and fishing rights.”)

“As Maine’s only Native American community without a tribal land base, the Aroostook Band of Micmacs faces major challenges in its quest for cultural survival.” 102 S. Rpt 136 (1991). The report describes the cultural practices of the band, including its historic homeland range along the west bank of the St. John River. “The ancestors of the Aroostook Micmac made a living as migratory hunters, trappers, fishers and gatherers until the 19th century.” It goes on to note that “[t]oday, without a tribal subsistence base of their own, most Micmacs in Northern Maine occupy a niche at the lowest level of the social order.” The discussion of the Band’s history ends by observing:

It is remarkable that the Aroostook Band of Micmac Indians, as a long disenfranchised and landless native group, has not withered away over the centuries. To the contrary, this community in Northern Maine has demonstrated an undaunted collective will toward cultural survival.

As with the Maliseets, it is clear Congress intended to establish a land base for the Micmacs that would enable the Tribe to secure its “cultural survival” and avoid acculturation. Congress intended for the Northern Tribes’ trust lands to provide a “subsistence base” on which the Tribes could assure their continued existence as a unique culture. And Congress was aware that part of that subsistence base for the Northern Tribes was their sustenance fishing practices.

State of Maine Comments on EPA’s Proposed WQS:

“The Penobscot Indian Nation (“PIN”) and the Passamaquoddy Tribe . . . are also subject to the same environmental regulatory treatment as the rest of Maine’s citizens, including with respect to water quality and fishing, but with a limited caveat namely, that members of these Southern Tribes may, within their respective reservations only, generally take fish free from otherwise applicable State fish and game rules regulating the method, manner, bag and size limits and season for taking fish, provided that the fish is taken for the Southern Tribal member’s individual sustenance rather than for a commercial or some other purpose.”

“[The sustenance fishing right] also has nothing to do with Maine’s underlying environmental regulatory jurisdiction over the quality of all State waters, which is expressly addressed by different jurisdictional portions of the 1980 Acts that contain no exceptions to Maine’s statewide environmental regulatory jurisdiction. See 30 M.R.S. §§

6204, 6206; 25 U.S.C. §§ 1721(b)(2)(4), 1725(a)-(b)(1). Thus, like the Northern Tribes, the Southern Tribes are subject to the same environmental regulatory treatment as the rest of Maine's citizens, including with respect to water quality, and that aspect of the settlement is also unaffected by any new EPA interpretation of any alleged underlying purpose of the 1980 Acts."

"Moreover, no part of MIA Sections 6204, 6206, or 6207 suggests in any way that there is any implicit or bootstrapped tribal right to a heightened quality of water or fish for any reason, let alone as a result of Section 6207(4). This is because the intent and plain terms of the 1980 Acts require equal environmental regulatory treatment with respect to all Maine waters for all Maine citizens, including members of all of Maine's Indian tribes. (Ex. 1, Second Amended Complaint, 16-50, 62-67). EPA wrongly cites to 30 M.R.S. § 6207 (81 Fed. Reg. at 23241) as an alleged reflection of Maine's intent to create a CW A designated use of "sustenance fishing," which would violate other express provisions and the core principles of the 1980 Acts."